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IN THE

Supreme Court of the United States

October Term, 1958

No. 119

SAMUEL ROTH, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

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Introduction

It should be noted that the opposition Brief of the United States does not deny that the maximum sentence was imposed for the minimal offense; it does not deny our contention that all of petitioner's past convictions violated his constitutional rights; it does not deny that the sentence was at least in part based upon this past record of unconstitutional convictions; it does not deny that these convictions in the remote past were unrelated to present moral character. Nor does it deny that a misrepresentation was made as to the views of this Court on the matter found obscene by the jury, merely claiming that the misrepresentation was not material. It admits that petitioner's sentence was equivalent to one of death, and way out of line with the normal and usual sentence. The Brief completely fails to deal with our Question 4.

ARGUMENT

POINT I

The Government's brief contains serious errors of fact.

(A) *Petitioner's conduct after trial.*

(1) The Solicitor General points out that Government counsel on sentencing had noted that "since indictment the Post Office had reported receipt of 1,650 written complaints *from recipients of such materials.*" (Brief, p. 3, emphasis supplied). Actually, Government counsel had merely noted that "I am informed by the Post Office that we received in excess of 1,650 written complaints after the indictment was filed." (App. 2A) He made no comment about these complaints being from recipients of such materials. Actually, virtually all of these complaints were from people complaining because the petitioner had not filled orders for books whose legality was being questioned at the trial. The difference is of course vital.

(2) The Government is aghast because "One package of magazines complained of had been mailed after trial". (p. 3) This was a magazine which the Jury had found not obscene at the trial. (Pet. 9) Accordingly, if anything, this points to the fact that if the trial court did consider such a factor, in determining the sentence, it considered that the exercise of free speech was a factor in determining that the sentence should be a harsh one. Cf. sub-paragraph G(2) *infra.*

(B) *Petitioner's Past Convictions Unconstitutional Even Without Applying Contemporary Standards.* The Brief of the Government constantly makes it appear that we are contending that the prior convictions of Mr. Roth were invalid only by present day standards. We argued below, as we argue here (Pet. 15), that the convictions

were unconstitutional even at the time that they were imposed, not merely because of any change in community standards, but also because, being classics (App. 4A), they could not constitutionally be obscene under the decision in Mr. Roth's own case. [Cf. *Eskridge* v. *Washington State Board*, 357 U. S. 214.] The Court of Appeals considered and determined this question. (Pet. 25).

(C) *"Premonitory Signals" Absent Before Trial.* The Government's Brief (p. 4) quotes petitioner's counsel at the sentencing as stating that petitioner "had had 'premonitory signals' * * * ". Actually, his counsel had stated merely that this particular conviction was itself a 'premonitory signal to go out of business.' (App. 5A). Petitioner never had any warning that his activities might subject him to conviction; indeed, he had invited this prosecution as a test case, (App. 5A), and had previously disseminated the same material on the basis of which he was convicted—without a murmur from even the Post Office. (Pet. 7).

(D) *Nature of offending materials—already conceded.* The Government's Brief mentions (pp. 4-5) that petitioner merely "argued that the materials which he mailed were not hard-core pornography". This understates the argument. The point was that the Solicitor General himself had admitted that Mr. Roth's materials were not hard-core pornography, but were at worst border-line entertainment—and the least offensive. (Pet. 8-9). We contend further that they were not obscene.

(E) *The Importance of the Past Convictions—the Sine qua non of the Sentence.* The Government claims (p. 6) that we make the contention that the Court below "considered only his (petitioner's) criminal record of convictions". It should be noted that our statement of Questions Presented in our Petition, questions the action of the sentencing court in considering solely *or primarily* the record of convictions. (Pet. 2). Fairly comprised within this question is, of course, the question of whether

the basing of a harsh sentence even partly upon an unconstitutional record of convictions in the remote past, is constitutional, legitimate or legal, even if other legitimate factors are considered. However, despite the Solicitor General's contention to the contrary, the sentencing court obviously did consider only the criminal record of convictions in imposing the sentence which it imposed. While the sentencing court did have before it other pertinent data, there is not a word in the record to indicate that it considered such data—and this Court previously had no hesitancy in striking down even state administrative actions where an unconstitutional standard was used despite the presence of all pertinent data. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

Moreover, there is no other explanation of petitioner's five-year sentence other than his past record of convictions in the light of the other "pertinent data" before the sentencing court. As the Solicitor General points out (p. 6), that other pertinent data included "details of petitioner's personal life, his family"—but his personal and family life were shown to be of the highest, as the Government itself concedes (Brief, p. 5). The Court also had before it the petitioner's "age and physical condition"—but as the Government itself concedes (Brief, p. 5), the sentence imposed "was tantamount to a death sentence in view of his age and physical condition (documented by an accompanying medical certificate)." If the Court also considered petitioner's "past and present business activities," the only activities of that sort that the sentencing court had before it was the harassment that the petitioner had from the Post Office (on which see Petition p. 19, fn. 14), together with Government counsel's complaint that petitioner had exercised his freedom of speech in mailing materials which had been determined to be legitimate exercises of freedom of speech in this very case. Thus, every bit of information that the Court had before it was favorable or non-derogatory; the only way that a five-year sentence could possibly be ex-

plained on this record is by the record of convictions. No reasonable man would have imposed a five-year sentence based on any consideration other than the past criminal record (except when considered together with the Government's misrepresentation, on which see G, *infra*).

The Government contends that the sentencing court "properly based its sentence on all these considerations" recited in the last paragraph *supra* (Brief, p. 6). There is not a word in the record to support this contention. Even the Court of Appeals did not so state, but merely pointed out that the sentencing court had had these other materials before it (Pet. 25).

In further support of our contention that the petitioner, but for his past record of illegal and unconstitutional convictions, never would have received the sentence he did receive, we note the fact that recently, a jail sentence for obscenity was suspended in the Southern District of New York, in the case of a first offender, solely because he was sixty-two years of age (the exact age of Mr. Roth at the time of sentence) and because he was in ill health (as Mr. Roth indeed is). *United States* v. *Padell*, C. 154-350. ("If your man were not 62 years of age and your man did not have what the doctor in his statement tells us about, he would go to jail * * * The inclination of this Court would be to send him to jail, but if sending him to jail is going to kill him, then I would not be justified in doing that" (R. 185, 187).[1]

(F) *New matters not considered at time of motion.* The Government contends that the only new matter urged at the time of petitioner's motion to reduce sentence was that

[1] Note, too, that *Padell* raises the question of denial of equal protection and hence of federal due process—for if Roth's sentence were *not* based on his criminal record, why should he receive a jail sentence in the Southern District, when Padell, identically situated, receives only a fine? Does justice depend on which judge hears a case?

the dissenting Justices of this Court thought the material involved not to be hard-core pornography. (Brief, p. 6). This statement is untrue. The new matters advanced at the time of petitioner's Motion to Reduce Sentence are set forth in our Petition, pp. 8-9.

(G) *Materiality of Government's Misrepresentation.* The Government complains that the misrepresentation of Government counsel on the motion to reduce sentence, when Government counsel complained that a majority of the Justices here thought the material to be obscene, was not material. On this, there are several points to be made:

(1) The materiality of this misrepresentation is seen from the statement of Government counsel on the motion as follows: "* * * I would say that to attempt to portray the prisoner in this case as an imposed-upon author is without foundation in the face of the finding of the jury as approved by appellate courts which reviewed the trial record in this case." (App. 25a). By these words, Government counsel admitted that the prisoner would appear to be an imposed-upon author but for the finding of the appellate courts that the material involved was pornography. By its own admission, the Government thus conceded that the defendant was indeed an imposed-upon author, for the appellate courts had not found the material to be pornographic.

(2) The Government argues, as we have previously noted, that the sentence was based on "all pertinent data" (p. 6). But the Government cannot have it both ways: if *all* pertinent data were considered by the sentencing judge, then he also considered the pertinent facts as misrepresented to him by Government counsel. Thus, under the Government's own theory of the case, its misrepresentation was most material. Surely a sentence based upon a record so tainted by the Government itself cannot stand. The dignity of the United States does not allow it. *Mesarosh* v. *United States*, 352 U. S. 1, 9.

(3) The Government also claims that Mr. Chief Justice Warren found petitioner to be plainly engaged in commercial exploitation of obscenity (p. 7). The language quoted from Mr. Justice Warren's opinion is equally susceptible of the construction that he was referring to the jury's finding to this effect, rather than commenting upon it himself. But the misrepresentation was still a misrepresentation, for the only Justice who clearly passed upon the material (Mr. Justice Harlan) found it not obscene. In any event, the question of obscenity was not decided by this Court, and it had never been presented, briefed, nor argued before it.

* * *

The Government's Brief cites only general propositions; but, as Mr. Justice Holmes observed, "General propositions do not decide concrete cases." *Lochner* v. *People of State of New York*, 198 U. S. 45, 76. General propositions of law notwithstanding, never before in our judicial history has a man received a federally-imposed severe (or maximum) sentence based upon a record of concededly unconstitutional convictions, recent or ancient, for a concededly borderline offense. The case deserves review.

CONCLUSION

The writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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